No. 47595-2-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

DJIBRIL DJIGAL,

Appellant,

v.

QUALITY LOAN SERVICE CORPORATION OF WASHINGTON, INC.; AURORA LOAN SERVICES, LLC; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; NATIONSTAR MORTGAGE, LLC; Wilmington Trust Company as Trustee for Lehman XS Trust Mortgage Pass-Through Certificates, Series 2007-6 AND DOES 1-20, INCLUSIVE,

Respondents.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Carol Murphy)

RESPONDENTS NATIONSTAR, AURORA, AND WILMINGTON'S ANSWERING BRIEF

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I. INTRODUCTION

This is a pre-sale "wrongful foreclosure" case. Appellant Djibril Djigal (Djigal) defaulted on his loan in November 2008 but his property has still not been sold at foreclosure.

At summary judgment, Nationstar Mortgage LLC (Nationstar) submitted sworn testimony that it had physical possession of the "wet ink" note memorializing Djigal's loan. Based on this uncontroverted evidence, the trial court found that Nationstar was the holder of the note and beneficiary of the deed of trust that secured Djigal's loan.

While Djigal's main contention in this lawsuit is that Aurora and Nationstar lacked authority to foreclose, the only admissible evidence presented to the trial court demonstrated that Aurora (the prior loan servicer and beneficiary) and Nationstar possessed the note at all relevant times. Further, the fact that no foreclosure took place drastically undercut any claim that Djigal has for damage or injury under his tort claims.

At summary judgment, Djigal argued that Nationstar could not foreclose because it was not the "owner" of the Loan. Since the summary judgment hearing, the Washington Supreme Court definitively came down on Respondents' side on this issue: the relevant inquiry when determining the authority to foreclose is holder status – the owner of the loan is not a

relevant inquiry. *Brown v. Dep't of Commerce*, --- Wn.2d ---, 359, P.3d 771, 2015 WL 6388153 (2015).

II. COUNTERSTATEMENT OF ISSUES

Was Djigal's first cause of action for injunctive relief properly dismissed where Nationstar proved it was the note holder and deed of trust beneficiary? Was the cause of action also properly dismissed as moot because no sale of the property was completed or pending at the time of the summary judgment hearing?

Was Djigal's second cause of action for violation of the Consumer Protection Act ("CPA") properly dismissed where there had been no "wrongful foreclosure" because the entities conducting the foreclosure had authority to do so? Was the cause of action also properly dismissed because Djigal did not present evidence of a compensable injury under the CPA where his lender exercised its contractual rights following Djigal's undisputed monetary default?

Was Djigal's third cause of action for "breach of duties" under the Deed of Trust Act ("DTA") properly dismissed because such a claim does not lie where there has been no completed foreclosure? *See Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn. 2d 412, 334 P.3d 529 (2014).

Was Djigal's fourth cause of action for intentional/negligent misrepresentation properly dismissed where Respondents did not

misrepresent their authority to foreclose – they were authorized to foreclose as a matter of Washington law? Was the cause of action also properly dismissed because Djigal failed to demonstrate reliance on any alleged misrepresentation, an essential element of the tort claim?

III. COUNTERSTATEMENT OF THE CASE

A. Procedural Posture

This lawsuit has a unique procedural posture that merits discussion at the beginning of the brief:

Djigal filed this case on August 21, 2013.[1]

Djigal filed his First Amended Complaint (FAC) on August 30, 2013.[2]

On December 6, 2013, Nationstar, Wilmington Trust Company, as Trustee for Lehman XS Trust Mortgage Pass-Through Certificates, Series 2007-6 (Wilmington) and Aurora Loan Services, LLC (Aurora) (collectively Respondents) filed a motion to dismiss some of the claims in the FAC based on the expiration of the statute of limitations.[3]

On January 10, 2014, the Court granted Defendants' motion to dismiss.[4] The Court: (1) dismissed all claims against MERS; (2) dismissed all claims under the CPA based on conduct occurring before

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[1] *See* CP 2.
[2] *See id.*
[3] *See id.*
[4] MTD Order, CP 261-62.

August 21, 2009; and (3) dismissed all claims for misrepresentation based on conduct occurring before August 21, 2010.[5]

On March 6, 2015, Respondents moved for summary judgment dismissal of the remaining claims in the lawsuit.[6] This motion was granted on April 17, 2015.[7] On the same date, the trial court granted Defendant Quality Loan Services Corporation of Washington, Inc.'s (Quality) motion for summary judgment.[8]

On May 15, 2015, Djigal filed his notice of appeal.[9] The pleading gives notice of appeal from the April 17, 2015 order granting Respondents' motion for summary judgment and the April 17, 2015 order granting Quality's motion for summary judgment.[10] The notice of appeal does not assign error to the CR 12 order of January 10, 2014 that dismissed all claims against MERS and certain claims against all other defendants as time-barred.[11]

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[5] *Id.*
[6] *See* CP 2.
[7] *See* CP 3.
[8] *See id.*
[9] Notice of Appeal, CP 524-534.
[10] *Id.*
[11] *Id.*

B. Djigal Refinanced His Olympia Property With a $524,800 Loan.

1. Origination of the Loan

This is a pre-sale "wrongful foreclosure" lawsuit relating to real property located at 11234 Emily Lane SW, Olympia, Washington 98512 (Property).[12]

On January 25, 2007, Djigal refinanced his mortgage on the Property with a $524,800 loan (Loan) from non-party Ward Lending Group, LLC (Ward).[13] The Loan was memorialized by a promissory note (Note) and secured by a deed of trust (Deed of Trust) against the Property.[14] By signing the Note, Djigal agreed that if he did not "pay the full amount of each monthly payment on the date it is due, [he] will be in default."[15]

The Deed of Trust states that all or some of the interest in the Note and Deed of Trust could be transferred without prior notice to Djigal and that such transfers could result in a change of the entity servicing the loan.[16]

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[12] Op. Br. 9
[13] Note, CP 281-86.
[14] *Id.*; Deed of Trust, CP 288-304.
[15] Note ¶ 6(B), CP 282
[16] Deed of Trust ¶ 20, CP 299.

2. Nationstar Has Physical Possession of the Indorsed in Blank Note.

The Note contains the following sequence of indorsements, the last of which is in blank:

1. Ward indorsed the Note as specifically payable to "Lehman Brothers Bank, FSB";

2. Lehman Brothers Bank, FSB indorsed the note as specifically payable to "Lehman Brothers Holdings Inc.";

3. Lehman Brothers Holdings Inc. indorsed the Note as specifically payable to "Aurora Loan Services, LLC";

4. Aurora Loan Services, LLC indorsed the Note in blank.[17]

The first three indorsements appear on the final page of the Note.[18] The final indorsement is affixed to the Note via an allonge.[19]

The record does not reflect the date the Note was indorsed in blank, but establishes that the indorsement in blank has been on the Note since at least July 1, 2012.[20]

The Loan was pooled and securitized.[21] The "owner" of the Loan is Wilmington Trust Company, as trustee of the Lehman XS Trust Mortgage Pass-Through Certificates, Series 2007-6 (Wilmington).[22]

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[17] Note, CP 283-84.
[18] *Id.*, CP 283.
[19] *Id.*, CP 284.
[20] Loll Decl. ¶ 8, CP 277-78.

At the time of the summary judgment hearing, Nationstar had maintained possession of the Note from July 1, 2012 until February 5, 2014, when the Note was sent to Appellees' counsel of record for use in this lawsuit.[23]

3. Servicing of Djigal's Loan Changed Pursuant to the Terms of His Loan Documents.

As noted above, the Deed of Trust disclosed that the servicing of the Loan could be changed without prior notice to Djigal.[24] A loan servicer is the entity responsible for, among other things, receiving and crediting any scheduled periodic payments, including amounts for any escrow accounts, and enforcing the terms of the loan for and on behalf of the owner of the loan, which in this case is Wilmington, as trustee.[25]

The undisputed evidence showed that Aurora serviced the Loan from February 26, 2007 (one month after origination) until July 1, 2012.[26] On July 1, 2012, Nationstar took over servicing of the Loan.[27]

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[21] *Id.* at ¶ 6, CP 277.
[22] *Id.*
[23] *Id.* at ¶ 8, CP 277-78.
[24] Deed of Trust ¶ 20, CP 299.
[25] Loll Decl. ¶ 8, CP 277-78.
[26] *Id.* at ¶ 7, CP 277.
[27] *Id.* at ¶ 8, CP 277.

4. By the Time He Filed This Lawsuit Djigal was Deeply in Default on the Loan.

As of January 22, 2015, Djigal was at least $269,339.70 in arrears on the Loan and the Loan was due and owing for the December 1, 2010 payment.[28] The unpaid principal balance of the loan was at least $738,225.62.[29]

C. Djigal's Default and Prior Foreclosure Proceedings.

Djigal states that financial hardship caused him to default on the Note in late 2008.[30] Djigal confirms that Aurora was the Loan servicer at the time.[31]

Following his default, on February 27, 2009, Djigal received a Notice of Default ("NOD") issued by Quality.[32] Quality signed the NOD as agent for Mortgage Electronic Registration Systems, Inc. ("MERS"), who was described as the "Beneficiary."[33]

On March 10, 2009, MERS appointed Quality as trustee under Djigal's Deed of Trust via an Appointment of Successor Trustee recorded in the Thurston County property records.[34] Djigal admits that he lacked

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[28] Loll Decl. ¶ 8, CP 278.
[29] *Id.*
[30] *See* FAC ¶ 2.2, CP 24.
[31] *Id.*
[32] NOD, CP 74-76.
[33] *Id.*
[34] March 2009 Appointment, CP 78-79.

the funds to cure his default and, as a result, Quality issued and recorded a notice of trustee sale (1st NOTS) on April 6, 2009.[35]

Djigal alleges that he had contact with Aurora throughout the latter part of 2009 and 2010 regarding potential loan modification or workout scenarios.[36] A permanent modification was not reached and foreclosure activity resumed.[37]

On December 29, 2009, MERS executed a Corporate Assignment of Deed of Trust (CADT) in favor of Aurora and Aurora executed a declaration unambiguously stating that it was the "actual holder of the Promissory Note[.]"[38] On July 26, 2010, Quality recorded a new notice of trustee sale (2nd NOTS) under Thurston County Auditor's File No. 4161981, setting a foreclosure sale date for October 29, 2010.[39] Pursuant to RCW 61.24.040(6), the last possible date to hold the trustee's sale under the 2nd NOTS was February 25, 2011. No sale was held under the 2nd NOTS and in fact Djigal declared Chapter 13 Bankruptcy one week before the last possible sale date.[40]

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[35] 1st NOTS, CP 81-83.
[36] *See* FAC ¶¶ 2.3; 2.4; 2.6; 2.8, CP 24-27.
[37] *See* FAC ¶ 2.6, CP 26.
[38] December 2009 Assignment, CP 85; 2009 Beneficiary Decl., CP 354
[39] 2nd NOTS, CP 89-91.
[40] *See* Voluntary Petition, CP 93-95.

D. Djigal's 2011 Bankruptcy.

Djigal and his wife filed a Chapter 13 Bankruptcy Petition on February 17, 2011.[41] The Bankruptcy Court confirmed Djigal's Chapter 13 Plan on December 10, 2011.[42] Djigal admits that he could not make the loan payments to Aurora required by the Plan and the case was dismissed on July 26, 2012.[43]

E. Post-Bankruptcy Foreclosure Activities.

Foreclosure proceedings resumed after dismissal of Djigal's Bankruptcy. On August 27, 2012, Quality issued a new notice of trustee sale (3rd NOTS), which it recorded in the Thurston County records.[44] On October 17, 2012, Aurora recorded an assignment of deed of trust in favor of Nationstar.[45]

On October 26, 2012, Nationstar recorded an appointment of successor trustee, re-naming Quality as successor trustee.[46]

Djigal received another NOD in March 2013.[47] By that time, the 3rd NOTS had expired without the sale taking place. See RCW 61.24.040(6). On April 23, 2013, Quality recorded a new notice of trustee

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[41] *Id.*
[42] Bankruptcy Docket at Dkt. No. 48, CP 134-35.
[43] FAC ¶ 2.10, CP 11-12; Bankruptcy Dkt. at Dkt. No. 69, CP 139.
[44] 3rd NOTS, CP 153-56.
[45] July 2012 CADT, CP 151.
[46] October 2012 Appointment, CP 158.
[47] FAC ¶ 2.15, CP 30.

sale (4th NOTS) that set a sale date of August 23, 2013 and which stated that Djigal was over $130,000 in arrears on his loan.[48] Djigal admits that he was not able to cure the arrearage at any point from that date to the present:

> Q: At the time you received this Notice of Trustee's Sale, were you able to pay that amount?
>
> A: No.
>
> Q: At any time since you received this Notice of Trustee's Sale, are you able to -- were you able to pay that amount?
>
> A: No.[49]

Although foreclosure started in April 2009 with the recording of the 1st NOTS, Djigal did not file suit or otherwise challenge foreclosure until August 21, 2013, two days before the sale date set by the 4th NOTS.[50]

IV. STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment *de novo*, engaging in the same inquiry as the trial court. *Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 184 Wn.2d 428, 435, 359 P.3d 753 (2015) (affirming trial court's grant of defendant's summary judgment motion).

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[48] 4th NOTS, CP 161-64.
[49] Djigal Dep. 90:4-10, CP 386.
[50] 1st NOTS, CP 81-83; *see* CP 2 (filing date); 4th NOTS, CP 161.

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). Once the moving party establishes no dispute exists as to a material fact, the burden shifts to the nonmoving party to show the existence of such fact. *Kahn v. Salerno,* 90 Wn. App. 110, 117, 951 P.2d 321 (1998). "The nonmoving party must set forth specific facts that demonstrate a genuine issue of material fact and cannot rest on mere allegations." *Lipscomb v. Farmers Ins. Co. of Wn.,* 142 Wn. App. 20, 27, 174 P.3d 1182 (2007).

V. ARGUMENT

A. Djigal Has Waived Any Challenge to the Court's Order Granting the Statute of Limitations Motion to Dismiss.

As discussed above, on January 10, 2014, the Court granted Respondents' motion to dismiss certain causes of action.[51] The Court: (1) dismissed all claims against MERS; (2) dismissed all claims under the CPA based on conduct occurring before August 21, 2009; and (3) dismissed all claims for misrepresentation based on conduct occurring before August 21, 2010.[52]

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[51] MTD Order, CP 261-62.
[52] *Id.*

Djigal's Notice of Appeal does not assign error to the January 10, 2014 Order.[53] On page 10 of his Opening Brief, Djigal "maintains that those rulings [on the motion to dismiss] were incorrect[.]" Djigal's Brief contains no further discussion of the January 10, 2014 Order or the impact of the statute of limitations on this case. The issuance of the January 10, 2014 Order is not listed in Djigal's assignments of error.[54]

Based on the foregoing, Djigal has not preserved a challenge to the January 10, 2014 error for appeal before this Court. *See* RAP 2.4(a). Even if he had preserved such challenge, he has waived an assignment of error to the Order by failing to include argument or authority in support of a potential assignment of error. *See State v. Thomas*, 150 Wn. 2d 821, 874, 83 P.3d 970, 996 (2004).

Therefore, for the purpose of this appeal, Djigal may not support his CPA claim with allegations of wrongful conduct that occurred before August 21, 2009 nor may he support his misrepresentation claims with allegations of wrongful conduct that occurred before August 21, 2010.

B. Nationstar Has Authority to Foreclose Because Nationstar Holds the Note.

The DTA defines "beneficiary" as the "holder" of the obligation secured by the Deed of Trust. RCW 61.24.005(2). The UCC defines the

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[53] *See* Notice of Appeal.
[54] Op Br. pp. 7-8.

"[h]older" of a negotiable instrument in relevant part as "the person in possession if the instrument is payable to bearer." RCW 62A.1-201(21)(A). A negotiable instrument is payable to bearer if, as is the case with the Note here, it is indorsed in blank. *See* RCW 62.A.3-205(b).

The Washington Supreme Court has just recently confirmed that the relevant inquiry when determining a deed of trust beneficiary is the holder of the note, not the owner:

> Under the UCC, promissory notes embrace two sets of rights. The first set of rights is held by the "person entitled to enforce" the note, a legal term of art commonly referred to as "PETE" status. See RCW 62A.3–301 (definition). The second set of rights is ownership of the note. The owner has the right to the economic benefits of the note, such as monthly mortgage payments and foreclosure proceeds. The PETE and the owner of the note can be the same entity, but they can also be different entities.

Brown v. Washington State Dep't of Commerce, --- Wn.2d ---, 359 P.3d 771, 778, 2015 WL 6388153 (2015).

When the PETE and the owner are different entities, the following rules apply:

> [T]he borrower owes and discharges his or her obligation to the PETE. The PETE enforces and modifies the note. This relationship remains the case even though the [PETE] is not the owner of the instrument. RCW 62A.3–301. The PETE's possession of the note provides the borrower with a relatively simple way of determining to whom his or her obligation is owed and, thus, whom to pay in order to be discharged.

Id. at 779 (internal quotations omitted).

In determining beneficiary status – that is, the party entitled to enforce the power of sale in the deed of trust – courts must look to the PETE/holder of the note. *Id.* at 789.

Here, the record shows the following:

1. The Note was indorsed to Aurora and then indorsed-in-blank.[55]

2. Aurora was the actual holder of the Note as of December 30, 2009.[56]

3. Nationstar maintained possession of the Note from July 1, 2012 until February 5, 2014, when the Note was transferred to Nationstar's attorneys of record for use in this lawsuit.[57]

Thus, while Aurora possessed the Note, Aurora was the holder of the Note and the beneficiary of the Deed of Trust. RCW 62A.1-01(21)(A); *Bain v. Metro Mtg. Gp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012). After July 1, 2012, when Nationstar possessed the Note, Nationstar was the holder of the Note and beneficiary of the Deed of Trust. *Id.*

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[55] Note, CP 283-84.
[56] 2009 Beneficiary Decl., CP 355.
[57] Loll Decl. ¶ 8, CP 277-78.

Djigal has not submitted any evidence that contradicts Nationstar's sworn testimony regarding the entities that possessed the Note or the dates of their possession. Instead, he complains that Aurora and Nationstar were "never anything more than the loan servicer."[58] Continuing on this theme in the body of his brief, Djigal argues that "there is no credible evidence that [Aurora and Nationstar] were the 'noteholder' rather than the custodian for Wilmington."[59]

The problem with Djigal's argument is that it cannot escape the sworn testimony Nationstar presented to the trial court in the form of beneficiary declarations and business records declarations. That testimony is exactly the evidence *Bain* sets out as satisfying the obligation of a successor lender for proving authority to foreclose a deed of trust. *Bain*, 175 Wn.2d at 111 ("If the original lender had sold the loan, that purchaser would need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions.").

Djigal's attempt to characterize Aurora and Nationstar as "just a servicer" does not pass muster under Washington law. In *Trujillo*, which was decided just before *Brown*, Wells Fargo was the loan servicer and Fannie Mae was the loan owner. *Trujillo v. Nw. Tr. Servs., Inc.*, 183

[58] Op. Br. p. 9.
[59] *Id.* at p. 33.

Wn.2d 820, 828, 355 P.3d 1100, 1104 (2015). The Supreme Court held that, even though Wells Fargo was the servicer, "Wells Fargo would constitute a 'holder,' and therefore a valid beneficiary under the DTA, if it actually held the note[.]" *Id.* at n. 4.

This holding was reinforced by *Brown*, which firmly rejected the claim that someone must be an "owner" in order to enforce a note and deed of trust. *Brown*, 359 P.3d at 778.

Here, Aurora and Nationstar did hold the Note and were therefore the beneficiaries of the Deed of Trust at all relevant times. This legal conclusion dooms Djigal's individual causes of action, which will be discussed in detail below.

C. The Most Recent Appointment of Successor Trustee Properly Appointed Quality as Deed of Trust Trustee.

Djigal originally filed this lawsuit on August 21, 2013.[60] At the time, there was a notice of sale pending against the Property – the 4th NOTS.[61]

The 4th NOTS was executed April 22, 2013 and recorded the next day.[62] The document was issued by Quality as trustee of the Deed of Trust.[63] It identifies Nationstar Mortgage LLC as the beneficiary.[64] In his

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[60] *See* CP 2.
[61] 4th NOTS, CP 161.
[62] 4th NOTS, CP 161-64.
[63] *Id.*, CP 161.

Brief, Djigal argues that Quality was not properly appointed trustee of the Deed of Trust. This is one of the issues to which Djigal assigns error in his Opening Brief.[65]

Respondents base Quality's authority to act as successor trustee on the appointment of successor trustee, signed October 25, 2012 and recorded the next day (2012 Appointment).[66] The document is executed by "Nationstar Mortgage LLC, by Quality Loan Service Corporation of Washington as its attorney in fact."[67] Critically, this document was executed and recorded before Quality issued the 4th NOTS.[68]

Djigal claims that the 2012 Appointment is ineffective because (1) Nationstar did not have authority to appoint Quality; and (2) Quality did not have the authority to execute the document as Nationstar's attorney in fact.[69]

1. Did Nationstar have authority to execute the Appointment? Yes.

The DTA provides that "[t]he trustee may resign at its own election or be replaced by the beneficiary." RCW 61.24.010; *see also Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 305-6, 308 P.3d

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[64] *Id.*
[65] *See* Issue No. 3, Op. Br. p. 7.
[66] October 2012 Appointment, CP 158-59.
[67] *Id*, CP 159.
[68] See 4th NOTS, CP 161-64.
[69] *See* Op. Br. pp. 4, 7.

716 (2013) (only lawful beneficiary may appoint successor trustee); *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 488, 309 P.3d 636 (2013) (same). Nationstar was the beneficiary of the Deed of Trust on October 25, 2012 because it held the indorsed-in-blank Note on that date.[70] Thus, Nationstar had authority to appoint a successor trustee.

2. Can a beneficiary execute an Appointment through an agent? Yes.

As held in *Bain*, "nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents." *Bain*, 175 Wn.2d at 106. *Neess v. Nw. Tr. Servs., Inc.*, No. C11-1939-JCC, 2012 WL 10277178, at *1 (W.D. Wn. Apr. 6, 2012) (dismissing with prejudice wrongful foreclosure lawsuit where foreclosing trustee was appointed via power of attorney). Thus, as a matter of law, Nationstar had the right to appoint an agent to execute the 2012 Appointment on its behalf.

3. Did Quality have authority to act as agent? Yes.

At summary judgment, Respondents introduced a limited power of attorney (POA) signed by a Nationstar vice president on September 28, 2007.[71] The POA was recorded in the Thurston County Property records

[70] Loll Decl. ¶ 8, CP 277-78.
[71] LPOA, CP 489-90.

on October 10, 2007.[72] The POA specifically grants Quality the power to execute appointments of successor trustee as Nationstar's attorney in fact.[73] *Meyer v. U.S. Bank Nat. Ass'n*, 530 B.R. 767, 778 (W.D. Wn. 2015) (*rehearing denied*) (possession of a power of attorney means that an authorized agent is empowered to bind the principal and the acts of such agent are deemed to be those of the principal itself) (*citing Ennis v. Smith*, 171 Wn. 126, 130, 18 P.2d 1 (1933).

In his brief, Djigal contends that:

> [N]one of the Defendants provided one word of testimony nor a single document that supports the assertion that any entity related to this case appointed QLS as its 'attorney in fact.'[74]

This contention is demonstrably untrue – the Court's Order granting Respondents' motion for summary judgment specifically states that the Court considered the declaration to which the POA was attached.[75]

Simply put, by the time Djigal filed suit in August 2013, Quality had been properly appointed as trustee of the Deed of Trust and had issued the 4th NOTS designating Nationstar as beneficiary. As a matter of law, Quality and Nationstar had authority to undertake these actions. Djigal contends that it was wrongful for Quality, as agent of the beneficiary, to

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[72] *Id.*
[73] *Id.*
[74] Op. Br. p. 16.
[75] Order, CP 533.

appoint itself as successor trustee. However, Djigal does not give a legal justification for that position.

Like Nationstar's authority to foreclose as holder and beneficiary, Quality's status as trustee at the time of the operative foreclosure is an inescapable legal conclusion that dooms Djigal's subsequent tort claims.

D. Djigal's First Cause of Action for Injunctive Relief Fails on the Substance and Also Because it is Moot.

The trial court properly dismissed Djigal's first cause of action for injunctive relief restraining the non-judicial foreclosure of the Property.[76]

First, as shown above, the operative notice of sale at the time the lawsuit was filed was the 4th NOTS.[77] As demonstrated in the preceding section, both Quality and Nationstar had authority to commence this foreclosure sale in light of Djigal's undisputed default. Accordingly, the cause of action for injunctive relief fails on the merits.

Second, the first cause of action was properly dismissed as moot. "A case is moot if a court can no longer provide effective relief." *Harbor Lands LP v. City of Blaine*, 146 Wn. App. 589, 592-593, 191 P.3d 1282 (2008) (quoting *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984)). The issue of mootness "is directed at the jurisdiction of the court" and may thus be raised at any time. *Citizens for Financially*

[76] *See* CP 14-15.
[77] *See* 4th NOTS, CP 161.

Responsible Gov't v. City of Spokane, 99 Wn.2d 339, 350, 662 P.2d 845 (1983). Because the operative notice of sale had expired there was no foreclosure sale pending at the time the summary judgment motion was decided.[78] Because there was no sale pending, there was nothing for the trial court to enjoin.[79] Thus, the first cause of action was moot and remains moot on appeal.

E. Djigal's Cause of Action for Breach Duties Under the DTA Fails Under *Frias*.

Djigal's third cause of action alleged breach of duty under the DTA.[80] However, this cause of action fails as a matter of law in the absence of a completed foreclosure sale. *See Frias*, 334 P.3d at 534 ("we hold the DTA does not imply a cause of action for monetary damages premised on DTA violations absent a completed foreclosure sale."). Djigal admits this point in his Brief.[81]

As no foreclosure of the Property was ever completed, Djigal's breach of duties claim was properly dismissed on summary judgment.

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[78] *See* 4th NOTS, CP 161. (4th NOTS setting original sale date of August 23, 2013); RCW 61.24.040(6) (permitting trustee to continue sale date for maximum of 120 days); Notice of Appeal, CP 524 (MSJ decided April 17, 2015).

[79] Defendants concede that if this appeal is affirmed and then a new foreclosure is initiated, Djigal might bring a new lawsuit to attempt to enjoin that new sale. However, Djigal will be limited by the preclusive effect of the rulings in this action.

[80] *See* FAC ¶¶ 3.11-3.15, CP 33-34.

[81] Op. Br. p. 27 ("In *Frias* and *Lyons*, the Supreme Court rejected the argument that plaintiffs may bring direct claims for violations of the DTA pre-foreclosure[.]").

F. Djigal's Consumer Protection Act Claim Fails as a Matter of Law.

Djigal's second cause of action alleged that all defendants violated the Consumer Protection Act ("CPA"). The crux of Djigal's argument is that Appellees attempted to foreclose on the Property without authority. As discussed above, the trial court's January 10, 2014 Order restricts Djigal's CPA claim to events occurring on or after August 21, 2009.[82]

1. Elements of a CPA Claim.

In order to prove a claim under the CPA, the plaintiff bears the burden of proving "(1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The failure to prove any of these elements requires dismissal of the CPA cause of action. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002). Here, Djigal cannot establish elements (1) (unfair or deceptive act or practice), (4) (injury), or (5) (causation).

Regarding the fourth prong, injury, while attorney fees may be recoverable by a plaintiff following a successful CPA action, attorney fees

[82] MTD Order, CP 261-62.

on their own are not sufficient to support the claim. *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992) (Merely "having to prosecute" a claim under the CPA "is insufficient to show injury to [a plaintiff's] business or property.").

2. Djigal's Citation to Rule 12 Cases Cannot Defeat Appellee's Rule 56 Motion.

Djigal's brief makes the following claim:

> With the exception of *Albice*, which did not address the issue because a CPA claim was not pled, all of the recent Washington foreclosure cases have consistently held that breach of duties and failure to adhere to the DTA's statutory requirements also constitute violations of the CPA and subject defendants to liability thereunder.[83]

This argument is wrong because the cases cited are motion to dismiss cases, not summary judgment cases. Accordingly, the plaintiffs in those actions were only required to allege a possible cause of action; they were not required to actually prove each element of their claim.

The idea that every unauthorized foreclosure action does not necessarily result in liability is a cornerstone of the decision in *Bain*. In that case, the Supreme Court addressed the certified question of "[d]oes a homeowner possess a cause of action under Washington's Consumer Protection Act against Mortgage Electronic Registration Systems, Inc., if

[83] Op. Br. 27.

MERS acts as an unlawful beneficiary under the terms of Washington's Deed of Trust Act?" *Bain*, 175 Wn.2d at 115. The Court held:

> If the first word in the third question was "may" instead of "does," our answer would be "yes." Instead, we answer the question with a qualified "yes," ***depending on whether the homeowner can produce evidence on each element required to prove a CPA claim***.
>
> ...
>
> ***[T]he mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury.***

Id. at 111-120 (emphasis added).

This principal is echoed in Djigal's cited cases:

For example, Djigal cites the *Walker* case repeatedly throughout his brief. However, *Walker* was an appeal from an order granting the defendant's motion for judgment on the pleadings. *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 302, 308 P.3d 716, 718 (2013), as modified (Aug. 26, 2013). The *Walker* court explained that "[b]ecause Walker's amended complaint alleges facts that, ***if proved***, would entitle him to some relief, we reverse in part and remand for further proceedings." *Id.* (emphasis added).

Djigal also cites *Bavand*, where the court held that where a party who is not the beneficiary purports to appoint a successor trustee, this could constitute a CPA violation. Op. Br. 32 (citing *Bavand v. OneWest*

Bank, FSB, 176 Wn. App. 475, 309 P.3d 636 (2013)). Like *Walker*, *Bavand* was a Rule 12 case that dealt with whether the plaintiff had pled facts sufficient to state a claim, not whether the plaintiff had met her burden of proof on summary judgment. *Id.*

The same holds true for *Frias*, and *Trujillo*, these were both Rule 12 cases where the plaintiff did not need to present actual proof of each CPA element. *Frias,* 181 Wn. 2d 412 (certified question following Fed. R. Civ. P. 12(b)(6) motion); *Trujillo,* 183 Wn.2d at 355 (appeal from grant of CR 12(b)(6) motion).

Indeed, the only summary judgment case that Djigal cites in support of his CPA claim is *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn. 2d 775, 336 P.3d 1142 (2014). For the reasons discussed in the next subsection, this case does not help Djigal on this appeal. Rather, Djigal is left citing a raft of cases that cannot cure the evidentiary shortcomings of his response to Respondents' motion for summary judgment. Djigal's suit was properly dismissed because Rule 56 requires evidence, not allegation.

3. The Beneficiary Declarations at Issue in this Case are Unambiguous and Un-actionable.

In part, Djigal bases his CPA claim on two beneficiary declarations executed during the course of the foreclosures of the Property. One

declaration was executed by Aurora on December 30, 2009.[84] The second declaration was executed by Nationstar on March 12, 2013.[85] Upon examination, both declarations comply with the Deed of Trust Act and Washington case law and are consistent with the other evidence presented by Respondents in this case.

The statutory basis for beneficiary declarations is set out in RCW 61.24.030. As applicable here, the statute provides:

> [F]or residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

RCW 61.24.030(7)(a).

In the *Trujillo* and *Lyons* cases, the Supreme Court considered beneficiary declarations that were ambiguous; rather than simply stating that the declarant was the note holder, they stated that the declarant is the:

> actual holder of the promissory note or other obligation evidencing the above-referenced loan ***or has requisite authority under RCW 62A.3–301 to enforce said obligation***.

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[84] CP 354.
[85] CP 356.

Lyons, 181 Wn.2d at 780; *see also Trujillo*, 183 Wn.2d at 1103 (emphasis added). The Supreme Court in both cases found that this "or requisite authority" language was improperly ambiguous:

> On its face, it is ambiguous whether the declaration proves Wells Fargo [the declarant] is the holder or whether Wells Fargo is a nonholder in possession or person not in possession who is entitled to enforce the provision under RCW 62A.3–301.

Lyons, 181 Wn. 2d at 791.

Here, however, the two beneficiary declarations do not contain the ambiguous language that the *Trujillo* and *Lyons* courts found actionable. Indeed, the 2009 Aurora declaration clearly states "Aurora Loan Services, LLC is the actual holder of the Promissory Note evidencing the above-referenced loan[.]"[86] The 2013 Nationstar declaration states "Nationstar Mortgage LLC is the actual holder of the Promissory Note dated 1/25/2007[.]."[87]

Confronted with the fact that the two declarations here do not contain the improper language called out by *Lyons* and *Trujillo*, Djigal claims that the declarations are ambiguous because they are executed by "the Beneficiary or Authorized Agent for [the] Beneficiary."[88] However,

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[86] CP 354.
[87] CP 356.
[88] *See* Op. Br. 34.

as explained below, there is nothing ambiguous or actionable about this language.

First, Aurora and Nationstar are corporations. As such, they are incapable of taking action on their own – all actions taken by a corporation are carried out by the corporation's authorized agents, whether they be officers, directors, employees, or independent contractors. Any flesh and blood person who executes any document on behalf of a corporation will necessarily be acting in an agency capacity.

The DTA recognizes this fundamental reality. As discussed above, Washington law is clear that "nothing...should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents." *Bain*, 175 Wn.2d at 106.

Thus, there is nothing wrongful or even suspicious about a corporation acting through its representatives to execute a document.

Second, the declarations are not ambiguous. Both declarations are made under penalty of perjury.[89] Both declarants state that they are made by employees of Aurora and Nationstar, respectively.[90] Both declarations state that Aurora and Nationstar, respectively, are the actual holders of the subject promissory Note.[91]

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[89] *See* CP 354, 356.
[90] *Id.*
[91] *Id.*

Finally, it is of no moment that the declarations do not demonstrate "ownership" of the loan, which Djigal in his brief suggests is a requirement.[92] As explained fully above, both the *Trujillo* and *Brown* courts firmly rejected the notion of any "ownership" requirement under the DTA. *Trujillo*, 183 Wn. 2d, at n. 4; *Brown*, 359 P.3d at 778.

Unlike the declarations in *Lyons* and *Trujillo*, a person reviewing the declarations here would have no doubt who was the beneficiary of the Deed of Trust and on what basis they claimed such status – first Aurora and later Nationstar was the Deed of Trust beneficiary because each of those entities was the holder of Djigal's Note.

Third, the beneficiary declarations are corroborated by the other evidence Respondents submitted in this case. As discussed earlier, Nationstar submitted sworn testimony that Aurora maintained possession of the Note from February 26, 2007 through July 1, 2012.[93] This is consistent with Aurora executing its beneficiary declaration in 2009.

Nationstar also submitted sworn testimony that it possessed the Note from July 1, 2012 until February 5, 2014, when the Note was transferred to Nationstar's counsel for use in this lawsuit.[94] This is consistent with Nationstar executing its declaration in 2013.

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[92] *See* Op. Br. 4 (complaining that declarations were not executed by "loan owner").
[93] Loll Decl. ¶ 7, CP 277.
[94] *Id.* at ¶ 8, CP 277-278.

In sum, Djigal attempts to hang his hat on the fact that the two beneficiary declarations in this case contain the word "or." The mere use of the word "or" in a beneficiary declaration does not make it ambiguous or actionable. The two declarations in this case do not contain the error at issue in *Trujillo* and *Lyons* and thus pass the test set by those two cases. Actual review of this case's declarations leaves no doubt as to the identity or capacity of the foreclosing beneficiaries. As such, the declarations are not unfair, they are not deceptive, and they are not sufficient to support Djigal's properly-dismissed CPA claim.

4. Djigal's Offer of Proof in Support of His CPA Claim was Woefully Inadequate as a Matter of Law.

The following excerpt from Djigal's declaration constitutes the entirety of his offer of proof in support of his CPA claim:

> I continue to face the loss of my home and have been trying to prevent it for years. I am challenging all of the amounts that have been added to his (sic) loan balance related to all of the attempts to foreclose that were done by entities who did not have the legal authority to do so. I know that I am responsible for making my mortgage payments, but that does not excuse the Defendants from complying with the law. In connection with my efforts to save my home, I had to pay Ms. Huelsman an initial consultation fee related to obtaining her assistance in investigating my claims and the issues related to all of the wrongful attempts at foreclosure. I also had to pay Ms. Huelsman $4,000.00 in attorneys' fees related to the work done on enjoining the foreclosure sale. This amount is separate from the retainer agreement that I have with Ms. Huelsman related to the affirmative work being done on pursuing my claims. In addition, I have spent

> at least $200.00 in travel and parking costs related to meeting with Ms. Huelsman initially and attending the hearing seeking enjoinder of the foreclosure, as well as other costs incurred in connection with pursuit of this lawsuit, including the $240.00 filing fee and service of process costs totaling $480.00 and deposition costs in the amount of $459.58.[95]

In the following paragraphs, Respondents will demonstrate in detail that each element of this testimony fails to satisfy the causation and injury prongs of Djigal's CPA claim.

Causation and injury are essential elements of a CPA claim that a plaintiff must plead, and ultimately prove. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986); *see also Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 65, 204 P.3d 885 (2009) ("If the investigative expense would have been incurred regardless of whether a violation existed, causation cannot be established."). Although the general threshold for a CPA injury is not high, where, as here, the plaintiff claims an unfair or deceptive act or practice based on an affirmative misrepresentation (in this case, that Nationstar was the "beneficiary," when it held but did not own the Note) the plaintiff must show "a causal link between the misrepresentation and the plaintiff's injury." *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10, 22 (2007).

[95] Djigal Decl., CP 419-20.

Critically, in this analysis, causation cannot be established "merely by a showing that money was lost." *Id.* at 81.

Breaking down the components of Djigal's declaration, it is clear that he cannot meet his burden on the damages and causation elements of his CPA claim.

First, Djigal states:

> I continue to face the loss of my home and have been trying to prevent it for years.[96]

As thoroughly established above, Djigal defaulted on his Loan and his Deed of Trust allows for the trustee's sale of the Property. Respondents have established that they did have authority to foreclose the Property as holders of the Note. Particularly, the 4th NOTS, which was the notice that Djigal actually challenged in court, was fully above board.

While Djigal's desire to prevent the foreclosure of his home is understandable, it is in no way compensable under the facts of this case. *See Babrauskas v. Paramount Equity Mortg.*, No. C13–0494RSL, 2013 WL 5743903 (W.D. Wash. Oct. 23, 2013) at *4 (plaintiff's "failure to meet his debt obligations is the "but for" cause of the default, the threat of foreclosure, any adverse impact on his credit, and the clouded title.").

Second, Djigal attests that:

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[96] Djigal Decl., CP 419.

> I am challenging all of the amounts that have been added to his (sic) loan balance related to all of the attempts to foreclose that were done by entities who did not have the legal authority to do so.[97]

Once again, Djigal cannot legitimately challenge Aurora and Nationstar's authority to foreclose in light of the evidence that they were the holders of the Note.

Further, Djigal presents no evidence as to what foreclosure fees he alleges were improper nor does he provide any sort of accounting of improper fees. Djigal's brief refers to improper foreclosure fees imposed at various points in 2010.[98] In support of this contention, Djigal cites to the "Djigal TRO Dec." – there is no Clerk's Papers reference.[99] The problem is that there was no Djigal TRO Declaration ever filed in this case.[100] Djigal is citing to evidence that simply does not exist.

For the sake of argument, Respondents will assume that Djigal might have a CPA claim if he could show that any specific fee was wrongfully charged. But he has not made this showing. Moreover, there

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[97] *Id.*
[98] Op. Br. pp. 11-12.
[99] *Id.*
[100] The Djigal TRO Decl. is not included in the Clerk's Papers. Respondents are unaware of any other citation or record showing that the Djigal TRO Decl. was ever filed in this case or that a TRO hearing was held. Undersigned counsel has repeatedly reviewed the Washington Courts website docket for this case and no record of a TRO motion or filing is reflected.

is no evidence that Djigal would have been able to cure his default in any circumstance, with or without the inclusion of foreclosure fees.[101]

As with Djigal's other theories of CPA liability, there simply is no evidence of a link between supposed wrongful conduct by Respondents and injury suffered by Djigal related to "foreclosure charges."

Third, Djigal attempts to support his CPA claim by alleging that his attorney fees incurred in this matter are CPA damages:

> In connection with my efforts to save my home, I had to pay Ms. Huelsman an initial consultation fee related to obtaining her assistance in investigating my claims and the issues related to all of the wrongful attempts at foreclosure. I also had to pay Ms. Huelsman $4,000.00 in attorneys' fees related to the work done on enjoining the foreclosure sale. This amount is separate from the retainer agreement that I have with Ms. Huelsman related to the affirmative work being done on pursuing my claims. In addition, I have spent at least $200.00 in travel and parking costs related to meeting with Ms. Huelsman initially and attending the hearing seeking enjoinder of the foreclosure, as well as other costs incurred in connection with pursuit of this lawsuit, including the $240.00 filing fee and service of process costs totaling $480.00 and deposition costs in the amount of $459.58.[102]

These litigation costs are not recoverable under the CPA. Merely "having to prosecute" a claim under the CPA "is insufficient to show injury to [a plaintiff's] business or property." *Sign–O–Lite Signs, Inc.*, 64 Wn. App. at 564; *See also Demopolis v. Galvin*, 57 Wn. App. 47, 786

[101] *See* Djigal Dep. 90:4-10, CP 386 (Deposition testimony by Djigal attesting to his lack of ability to pay cure amounts listed in Notice of Trustee's Sale).
[102] Djigal Decl., CP 419-20.

P.2d 804 (1990) (subsequent purchaser's prosecution of CPA claim brought to protect property against lender's non-judicial foreclosure insufficient to establish CPA injury); *Thursman v. Wells Fargo Home Mortg.*, 2013 WL 3977662, * 3-4 (W.D. Wash. Aug. 2, 2013) (resources spent pursuing CPA claim are not recoverable injuries under the CPA; collecting cases); *Babrauskas*, 2013 WL 5743903 at *4 (citing *Sign-o-Lite* and stating "the fees and costs incurred in litigating the CPA claim cannot satisfy the injury to business or property element: if plaintiff were not injured prior to bringing suit, he cannot engineer a viable claim through litigation.").

Sign-O-Lite can be compared against *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009), which Djigal relies on heavily in his brief.[103] Djigal cites *Panag* for the proposition that investigative costs, such as attorney fees, are recoverable in a CPA action.[104] However, *Panag* is genuinely distinguishable on the facts.

In *Panag* the plaintiff's CPA claim was based on aggressive and continuous collection notices delivered to the plaintiff in relation to an automobile subrogation claim held by Farmers – the insurer of the *other* driver in the underlying accident. *Panag*, 166 Wn.2d at 34, 65.

[103] *See* Op. Br. p. ii (citing *Panag* in passim).
[104] *Id.*

Moreover, Farmers pursued its subrogation claim through a collection agency, CCR, to which Plaintiff also had no relationship. *Id.* at 35.

Thus, in *Panag*, the plaintiff was being confronted with demands to pay a debt by a company he had never heard of. *See id.* His costs to investigate the nature of this alleged debt were therefore recoverable as CPA damages. Contrast *Panag* with the pending matter, where Aurora and Nationstar serviced Djigal's loan for years.[105] There is no evidence that Djigal ever disputed the existence of or Respondents' right to enforce the Loan until he was faced with foreclosure. For example, Djigal affirmed the existence of his debt on the Loan in his bankruptcy schedules.[106]

Indeed, Djigal did not file suit after the 1st, 2nd, or 3rd Notices of Trustee's Sale were recorded. Rather, he waited until two days before sale on the 4th NOTS before filing this lawsuit.[107] Djigal has failed to submit any evidence that compromises the fourth foreclosure – the foreclosure that precipitated this lawsuit.

This history is why the claim of litigation expenses is such an empty shell – Djigal brought suit to stop the fourth foreclosure proceeding.

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[105] Loll Decl. ¶¶ 7-8, CP 277-78.
[106] Bankruptcy Schedule D, CP 102.
[107] *See* CP 2 (filing date); 4th NOTS, CP 161.

Litigation expense incurred in stopping this foreclosure cannot be causally linked to wrongful conduct.

Djigal defaulted on the Loan in late 2008.[108] When the foreclosure process started in 2009, Djigal engaged in delaying tactics. This included declaring Chapter 13 bankruptcy, which was dismissed once again due to his default on plan payments.[109] It was only when foreclosure was imminent that he retained an attorney to prosecute a CPA claim.[110] Thus, Djigal's "damages" are related not to investigative costs, but merely having to prosecute the action.

Indeed, similar to *Panag*, in *Bain* the Supreme Court was concerned that use of the MERS system and multiple assignments of a loan could leave the borrower confused as to whom he was supposed to make payments. *Bain*, 175 Wn.2d at 119. Here, however, there is no evidence of any confusion over the validity of the debt or the proper party to receive payments. Lacking any confusion, there was simply no pre-suit investigative work to be done, as there was in *Panag*. Accordingly, Djigal's actual litigation costs are insufficient CPA damages for the reasons explained in *Sign-O-Lite*.

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[108] *See* FAC ¶ 2.2, CP 24.
[109] FAC ¶ 2.10, CP 11-12; Bankruptcy Dkt. at Dkt. No. 69, CP 139.
[110] *See* Djigal Decl., CP 419-20.

Finally, Djigal's alleged damages related to restraining the trustee's sale or to an injunction hearing are not compensable. That is because the record shows that no TRO or injunction motion was ever filed nor was any hearing held on a TRO or injunction, nor was any restraining order granted.[111] Djigal cannot base a CPA claim on litigation expenses for litigation events that did not occur.

Here, Defendants have presented evidence that (1) the loan is valid; (2) Djigal is in default; (3) Nationstar has authority to foreclose; and (4) no foreclosure has taken place. In response, Djigal says he incurred time and cost pursuing litigation to stop the foreclosure.[112] This time and cost is not "injury" under the CPA because the foreclosure was valid. The time and cost is also not "injury" because it was incurred merely to prosecute the CPA claims.

G. Djigal's Cause of Action for Intentional and/or Negligent Misrepresentation Was Properly Dismissed with Prejudice.

Djigal's Fourth Cause of Action for Intentional and/or Negligent Misrepresentation is purely derivative of his CPA theories of liability. It fails for the same reason the CPA claim fails and also because Djigal cannot demonstrate reliance – a critical element of the two torts.

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[111] *See* FN 98, *supra.*
[112] *See* Djigal Decl., CP 419-20.

The elements for intentional misrepresentation are (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon the representation; and (9) damages suffered by the plaintiff. *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008). The elements for intentional misrepresentation must be proved by "clear, cogent, and convincing evidence." *Stiley v. Block*, 130 Wn.2d 486, 504, 925 P.2d 194 (1996).

The elements of negligent misrepresentation are: (1) that defendant supplied information for the guidance of others in their business transactions that was false; (2) that the defendant knew or should have known that the information was supplied to guide the plaintiff in business transactions; (3) that the defendant was negligent in obtaining or communicating false information; (4) that the plaintiff relied on the false information supplied by the defendant; (5) that the plaintiff's reliance on the false information supplied by the defendant was justified (that is, that reliance was reasonable under the surrounding circumstances); and (6) that the false information was the proximate cause of damages to the plaintiff. *Borish v. Russell*, 155 Wn. App. 892, 905 n.7, 230 P.3d 646 (2010). All

six elements of a negligent misrepresentation claim must be proved by "clear, cogent, and convincing evidence." *Id.* "Where the correct information is reasonably ascertainable by the complaining party, he [or she] may not justifiably rely on the other party's statement." *Rainier Nat'l Bank v. Clausing*, 34 Wn. App. 441, 446-47, 661 P.2d 1015 (1983). "Moreover, the plaintiff must not have been negligent in relying on the representation." *Ross v. Kirner*, 162 Wn.2d 493, 500, 172 P.3d 701 (2007).

Here, Djigal cannot prevail on either misrepresentation theory because none of the Defendants ever provided misleading or false information about their relationships to the subject loan, identity of the true noteholder, or authority to foreclose. As explained above, Aurora and then Nationstar qualified as "holders" and thus beneficiaries at all relevant times. Djigal's misrepresentation claims must be dismissed because he cannot produce clear, cogent and convincing evidence of any actual misrepresentation, much less with respect to any other element of the causes of action. *See Forsberg v. Ocwen Loan Servicing, LLC,* 2014 WL 6791956, at *4 (W.D. Wash. 2014) (dismissing intentional and negligent misrepresentation claims where plaintiff offered insufficient support for allegations functionally identical to Djigal's misrepresentation allegations).

Indeed, both theories of misrepresentation require reliance as an essential element. The evidence here is that Djigal did not rely on anything the Respondents said or did. He did not pay them money, he declared bankruptcy to prevent the sale of the Property, and he ultimately filed a lawsuit after his bankruptcy was dismissed for non-payment. Even if Djigal could prevail on his CPA claim (he cannot), the lack of reliance critically dooms any misrepresentation claim he might have.

H. The Trial Court Properly Relied Upon the Loll Declaration in Granting Respondents' Motion for Summary Judgment.

One final issue raised in Djigal's appeal is the trial court's reliance on the Declaration of A.J. Loll, a Nationstar Vice President.[113] Djigal does not contest Loll's ability to testify regarding Nationstar's business records, but he does object to Loll's testimony regarding the records of the prior servicer, Aurora. Indeed, Djigal's assignment of error reads in part:

> This includes the fact that there is no documentation provided to support the bald-assertion by another servicer employee (Nationstar) about the location of the Note ***prior to July 1, 2012*** [when Nationstar began servicing the Loan].

(emphasis added).[114] Once again, Djigal's critique of the Loll declaration is limited to testimony regarding what occurred before Nationstar began servicing.[115]

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[113] *See* Op. Br. pp. 21-22.
[114] *Id.* at p. 7.

Importantly, the Court need not reach the issue of whether Loll's testimony regarding Aurora is admissible. That is because Aurora's holder status is established through the 2009 beneficiary declaration.[116] Loll's testimony corroborates and supplements the testimony in the beneficiary declaration, but the declaration stands on its own. Indeed, the declaration is all that is required under the DTA to establish an entity's authority to foreclose. RCW 61.24.030(7)(a) (allowing trustee to initiate sale in reliance on beneficiary declaration).

The story of this case is a lack of evidence from Djigal, not from the Respondents. When the 2009 beneficiary declaration and the Loll declaration are taken together, Djigal's argument boils down to: they have multiple pieces of evidence and some are better than others. Under the summary judgment standard, Respondents' evidentiary showing puts the

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[115] *See id.* Djigal does not raise the issue of Nationstar's ability to testify regarding its own records and thus that assignment of error is waived on appeal. To the extent Djigal attempts to raise this issue in his reply, Respondents anticipate that Djigal will cite to *Podbielancik v. LPP Mortgage Ltd.*, No. 72915-2-I, 2015 WL 8910144 (Wash. Ct. App. Dec. 14, 2015). That case concerned whether a declarant could testify to the contents of two specific documents when those documents were not in the record. *Id.* at *2. Here, the relevant documents – the note and deed of trust – are in the record. CP 281- 304. Also in the record is the 2013 Nationstar Beneficiary Declaration, which is standalone proof of Nationstar's holder status. As recently held by the Supreme Court in *Brown*, foreclosing parties may base their authority on an unambiguous declaration as to holder status. *Brown*, 359 P.3d at 786.

To the extent Djigal improperly raises new arguments about components of Loll's testimony that do not concern the content specific documents (the issue in *Podbielancik*), such computerized records are plainly admissible under RCW 5.45.020 *See Discover Bank v. Bridges*, 154 Wash. App. 722, 226 P.3d 191 (2010) (upholding admission of computerized business records).

[116] *See* CP 354.

ball back in Djigal's court. He has not come forward with any evidence contradicting Aurora and Nationstar's holder status and so his summary judgment defense fails.

VI. CONCLUSION

Djigal defaulted on this Loan over seven years ago yet his home has never been foreclosed. While Respondents and their predecessors initiated several foreclosures of the Property, no foreclosure was completed and no lawsuit was filed. It was not until two days before the fourth foreclosure that Djigal actually filed suit. As reflected in the very title of his "First Amended Complaint for Temporary Restraining Order and Preliminary Injunction...," the purpose of the lawsuit was to restrain the then-pending foreclosure.

Djigal's claims fail because this fourth non-judicial foreclosure was prosecuted in strict compliance with the Deed of Trust Act. Djigal has no evidence that either Nationstar (beneficiary) or Quality (trustee) lacked authority to pursue the foreclosure. On the other hand, Respondents have demonstrated that the following events occurred in order:

- Nationstar obtained possession of the indorsed-in-blank Note and thus obtained holder status;

- Nationstar appointed Quality as successor trustee of the deed of trust;
- Quality recorded the 4th NOTS, which was the operative notice at the time the suit was filed.

Not only does Djigal lack evidence of wrongful conduct, he lacks evidence of damages or injury. Djigal's claims for injury boil down to three categories: (1) threat of losing his home; (2) improper foreclosure fees; and (3) litigation costs. Djigal cannot recover for the threat of losing his home where he admits he pledged his home as security for a loan and defaulted. Djigal cannot recover for improper foreclosure fees because his evidence for such fees is a declaration never filed in the suit. Djigal cannot recover for litigation costs because those costs are not recoverable under the CPA.

Respondents have thoroughly carried their CR 56 burden and this was recognized by the trial court. With respect, this Court should affirm that just and proper ruling.

RESPECTFULLY SUBMITTED this 20th day of January, 2016.

LANE POWELL PC

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of January, 2016, I caused to be served a copy of the foregoing **RESPONDENTS NATIONSTAR, AURORA, AND WILMINGTON'S ANSWERING BRIEF** on the following person(s) in the manner indicated below at the following address(es):

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DATED this 20th day of January, 2016.

Peter Elton